BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-019-C - ORDER NO. 2001-107

FEBRUARY 5, 2001

| | | |
|---|---|---|
| IN RE: Petition for Arbitration of IDS Telecom, LLC with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended. | ) | ORDER DENYING MOTION TO CHANGE ARBITRATION PLAN AND ESTABLISHING ARBITRATION PLAN AND SCHEDULE |

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Motion to Establish Arbitration Plan filed by IDS Telcom, LLC ("IDS"). IDS has filed a Petition requesting that the Commission arbitrate certain unresolved issues concerning a local interconnection agreement between IDS and BellSouth Telecommunications, Inc. ("BellSouth"). IDS's Petition for Arbitration was filed pursuant to Section 252 of the Telecommunications Act of 1996 ("1996 Act").[1]

By its Motion, IDS requests that the Commission change its arbitration procedure to allow for the presentation of each witness's testimony individually and to allow the parties, in addition to the Commission, to cross-examine each of the other party's witnesses. IDS alleges that the Commission's adopted procedure violates the parties' right to confront and cross-examine witnesses.

After the 1996 Act vested the Commission with the responsibility of arbitrating open issues of interconnection agreements, the Commission established an arbitration

procedure for use in arbitration proceedings arising under the 1996 Act. Under the Commission established procedure, the Commission requires the parties to prefile testimony of witnesses. The Commission also affords the parties the opportunity to file non-binding lists of questions for the Commission, or the Commission's designee, to ask. At the proceeding before the Commission, the Commission allows attorneys for each party or participant to make an opening statement. The Commission then swears in all the witnesses in the proceeding, and the witnesses are presented in panel format. The Commission, or its designee, conducts the examination of the witnesses. Attorneys for the parties are then afforded the opportunity for closing arguments. Following the hearing, parties are afforded the opportunity to file post-hearing briefs and/or proposed orders. The Commission has conducted several arbitration proceedings using the above-described procedure.[2]

**DISCUSSION**

In lieu of the Commission-adopted described above, IDS requests that the Commission adopt an arbitration plan that provides for each witness to testify individually, rather than in panel format, and that the parties, in addition to the Commission, conduct cross-examination of the witnesses. IDS asserts that the procedure that it proposes would satisfy the parties' right to confront and cross-examine witnesses. IDS further asserts that the parties right to confront and cross-examine witnesses would

[1] Section 252 of the Telecommunications Act of 1996 was later codified as 47 U.S.C. 252.

[2] The one exception to the above-described procedure was the arbitration proceeding involving Adelphia Business Solutions of South Carolina, Inc. and BellSouth (Docket No. 2000-516-C). In that arbitration proceeding involving Adelphia and BellSouth, the parties resolved all but one issue in the case. On the one remaining issue, the parties agreed to stipulate the prefiled testimony into the record and submit briefs on

not be satisfied under the Commission-adopted arbitration plan. Further, IDS affirmatively asserts its right to confront and cross-examine witnesses, and in support of its asserted right, IDS cites to the South Carolina Administrative Procedures Act, S.C. Code Ann. Section 1-23-330 (1986), the due process clauses of the South Carolina and United States Constitutions, and several South Carolina cases.

The Commission would first note that an arbitration of an interconnection agreement is brought before this Commission pursuant to Section 252 of the Telecommunications Act of 1996 ("1996 Act"). Thus the Commission believes that the South Carolina Administrative Procedures Act is not applicable to an arbitration of an interconnection agreement pursuant to Section 252 of the 1996 Act.

Section 252(b) of the 1996 Act is entitled "Agreements Arrived at Through Compulsory Arbitration." Section 252(b)(1) provides "during the period from the 135th day to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues."[3] Section 252(b)(4)(C) of the 1996 Act provides that "the State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under the section."[4] As the

that issue. The Commission agreed with the parties' proposal to submit the issue on the prefiled testimony and written briefs. The parties also filed proposed orders on that issue.

[3] 47 U.S.C. § 252(b)(1).

[4] 47 U.S.C. § 252(b)(4)(C).

Commission has by statute only 9 months in which to resolve any open issues presented in an arbitration proceeding, the Commission faces a severe time constraint in conducting an arbitration proceeding pursuant to Section 252 of the 1996 Act. In fact, approximately half of the 9 month time frame has elapsed before the Commission ever receives a petition for arbitration. Thus the Commission must act expeditiously on a petition for arbitration filed pursuant to Section 252 of the 1996 Act.

The cases cited by IDS are not helpful to the determination of IDS's request. IDS cites to the case of *State v. Gulledge,* 326 S.C. 220, 487 S.E.2d 590 (1997) for the premise that "due process requires the opportunity to be heard and to cross-examine witnesses be given."[5] However, this case is clearly distinguishable from the situation before the Commission. *Gulledge* involved a restitution hearing following a guilty plea in South Carolina General Sessions Court. The Supreme Court of South Carolina held that in a restitution hearing that the rules governing sentencing proceedings should apply. The Court also stated that "although the trial judge is allowed broad discretion in conducting the restitution hearing, the statute contemplates an adversarial hearing to prove the amount of restitution."[6] It is in this context of a statutory proceeding which contemplates an adversarial proceeding that the Supreme Court stated that the due process clauses of both the South Carolina Constitution and the United States Constitution require notice of the hearing and the opportunity during the hearing to be heard and to cross-examine witnesses.[7]

---

[5] Motion at 3.
[6] *State v. Gulledge,* 326 S.C. 220, 487 S.E.2d 590, 595 (1997).
[7] *Id.*

The other two cases cited by IDS are *Zaman v. South Carolina State Board of Medical Examiners,* 305 S.C. 281, 408 S.E.2d 213 (1991) and *South Carolina Department of Labor v. Girgis,* 332 S.C. 162, 503 S.E.2d 490 (Ct. App. 1998). Both of these cases involved disciplinary matters against doctors and were clearly contested cases under the South Carolina Administrative Procedures Act. As noted above, the requirement that the Commission resolve open issues related to interconnection agreements arises under the 1996 Act, a federal law.

Arbitration is a method of dispute resolution that is viewed as more informal than traditional litigation. An arbitrator enjoys a wide latitude in conducting an arbitration hearing, and arbitration proceedings are not constrained by formal rules of procedure or evidence.[8] The arbitrator is not bound to hear all the evidence tendered by the parties; however, he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments.[9]

In *Sunshine Mining Co. v. United Steelworkers of America, AFL-CIO, CLC and Local 5089,* 823 F.2d 1289 (9th Cir.1987), the Ninth Circuit Court of Appeals stated that "an arbitrator 'need only grant the parties a fundamentally fair hearing'" and then stated that "[a] hearing is fundamentally fair if it meets the 'minimal requirements of fairness' – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator."[10] Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the

[8] *Hotels Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901,* 763 F.2d 34, 38-39 (1st Cir.1985)
[9] *Id.* at 39.
[10] 823 F.2d at 1295 (citations omitted).

arbitrators.[11] Further, the Ninth Circuit Court of Appeals, citing *Hoteles Condado Beach*, stated "[s]imilarly, a party does not have an absolute right to cross-examination. The arbitrator must, however, give each of the parties to the dispute an adequate opportunity to present its evidence and arguments."[12]

In *Robbins v. Painewebber Inc.*, 954 F.2d 679 (11th Cir.1992), the Eleventh Circuit Court of Appeals stated:

> ... the Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues. The arbitrator is not bound to hear all the evidence tendered by the parties; he need only give each party the opportunity to present its arguments and evidence. (internal citations omitted).

954 F.2d at 685.

Thus, federal case law supports the notion that arbitrations do not require the same procedural protections as judicial proceedings. Further, federal case law makes clear that parties to an arbitration do not have an absolute right to cross-examination of witnesses. Under the Commission's procedure, fundamental fairness is met. The parties are afforded notice of the proceeding through the filing of the petition and the response. Section 252(b)(2)(A) requires that petitioner "provide ... all relevant documentation concerning – (i) the unresolved issues; (ii) the position of each party with respect to those issues; and (iii) any other issues discussed and resolved by the parties."[13] Further, the petitioner is also required to "provide a copy of the petition and any documentation to the

---

[11] *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir.1994).
[12] *Id.* (citations omitted).
[13] 47 U.S.C. § 252(b)(2)(A).

other party not later than the day on which the State commission receives the petition."[14] Within twenty-five days after the State commission receives the petition, a non-petitioning party may respond to the petition and provide such additional information as it wishes.[15] Therefore, the petition and the response to the petition, if any, set forth the issues before the Commission in the arbitration and also set forth the positions of each party, thus providing notice to the parties of the issues before the Commission as arbitrator.

Further, the Commission's requirement of prefiling of testimony provides each party with ample opportunity to present relevant evidence to the Commission concerning each issue. Also, parties are afforded the opportunity to present arguments to the Commission at the close of the proceeding before the Commission, as well as the opportunity to present arguments after the proceeding in the form of briefs. Thus, the Commission finds that its established arbitration procedure presents each party with an adequate opportunity to present its evidence and arguments on the issues.

## CONCLUSION

The Commission concludes that the parties to an arbitration proceeding brought before the Commission pursuant to Section 252 of the 1996 Act have no absolute right to cross-examination. Furthermore, as the Commission's established arbitration procedure provides the parties with ample notice of the issues and provides the parties with adequate opportunity to present evidence and arguments to the Commission, the Commission concludes that its established arbitration procedures provide for a

[14] 47 U.S.C. § 252(b)(2)(B).
[15] 47 U.S.C. § 252(b)(3).

fundamentally fair hearing. Therefore, the Commission denies IDS's Motion to Establish Arbitration Plan, and the Commission will proceed with an arbitration plan identical to its previously adopted arbitration plan as discussed above.

As the Commission has determined that it will proceed with its previously adopted arbitration plan, the Commission must now establish a schedule for that arbitration plan. IDS filed its Petition for Arbitration on January 8, 2001. Section 252 (b)(4)(C) of the Telecommunications Act of 1996 requires that a state commission hear and rule on a petition for arbitration no later than 9 months after the date on which the local exchange carrier received the request for negotiation. We must therefore hear and rule on this matter on or before April 30, 2001. Accordingly, we will rule on various procedural matters connected with this case in this Order and establish an Arbitration Plan.

The Arbitration Hearing in this Docket shall begin at **11:00 A.M. on Monday, March 12, 2001,** in the Commission Hearing Room.

The Commission hereby orders that twenty-five (25) copies of the testimony and exhibits of IDS shall be prefiled on or before **February 12, 2001**. Further, twenty-five (25) copies of the testimony and exhibits of BellSouth shall be prefiled on or before **February 26, 2001**. IDS shall prefile any rebuttal testimony and exhibits on or before **March 5, 2001**, and BellSouth shall prefile any surrebuttal testimony and exhibits on or before **March 7, 2001.** It should be noted that acceptance of surrebuttal testimony and exhibits is subject to the discretion of the Commission.

The parties shall serve the other parties with copies of all prefiled testimony and exhibits. **Service of testimony and exhibits on the parties and the Commission shall be made by the close of business on the dates herein specified.** If service cannot be accomplished on the dates indicated herein, service may be accomplished by facsimile transmission of the prefiled testimony and exhibits by the close of business on the dates specified with over-night delivery of the testimony and exhibits to follow.

All parties are reminded that all witnesses must be present during the hearing in this matter at the call of the Chairman, or the Commission may decline to allow the witnesses' testimony to be read into the record of the proceeding, and/or may decline to allow the witnesses' exhibits to be entered into the evidence of the case.

Opening statements of the parties and any participants will be allowed at the beginning of the hearing. Closing statements of the parties and any participants will be allowed at the conclusion of the hearing.

Direct testimony and exhibits of the parties' witnesses shall be presented to the Arbitrator in a panel format, with all witnesses being sworn in concurrently. Examination of the witnesses shall be conducted by the Arbitrator or its designee. The examination may be directed to specific witnesses or to the entire panel of witnesses. Responses by other witnesses, other than the witness or witnesses to whom the question is directed, may be allowed at the discretion of the Arbitrator. Under this format, IDS and BellSouth, as well as any participants in this matter, may submit a non-binding list of questions to the Arbitrator (the Commission) by the close of business on **March 5, 2001.** An original and five copies of the non-binding list of questions should be submitted to the

Commission, but the non-binding list of questions need not be served on the other party or on participants.

IT IS THEREFORE ORDERED THAT:

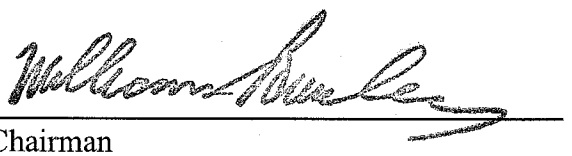
1. IDS's Motion to Establish Arbitration Plan is denied.

2. The Commission will proceed in this matter under an arbitration plan identical to its previously adopted arbitration plan as set forth above.

3. Any party requesting modification of this schedule adopted herein must file a request for such modification with the Commission.

4. This Order will remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:

Executive Director

(SEAL)